

1, K. Durkand



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Custom Training Aids, Inc.

File: B-236755

Date: January 5, 1990

DIGEST

Where contracting officer could not reasonably conclude from previous performance history that the incumbent contractor's product complied with current requirements, waiver of bid sample requirement under the solicitation's bid sample provision and subsequent award to incumbent was improper.

DECISION

Custom Training Aids, Inc. (CTA), protests the rejection of its bid and the award of a contract to Blane Corporation under invitation for bids (IFB) No. DAHA10-89-B-0006, issued by the U.S. Property and Fiscal Officer for Idaho, National Guard Bureau, Departments of the Army and the Air Force, Boise, Idaho, for thermal targets. CTA argues that the agency failed to test the correct bid sample of the two which it submitted. The protester also complains that the agency failed to require the awardee to provide a bid sample to be tested and that the awardee's product does not meet the specifications. We agree that the agency improperly awarded the contract to Blane and therefore sustain the protest.

The IFB was issued June 8, 1989, and four firms, including the apparent low bidder, CTA, submitted bids by the July 11 bid opening date. Two firms, including CTA, were found to be nonresponsive to the solicitation based on the failure of their bid samples. Another bidder withdrew its bid prior to bid opening. Consequently, Blane Corporation, the incumbent, which was not required to submit a bid sample, was determined to be the only responsive bidder, and the National Guard awarded it the contract on August 23. This protest followed.

The IFB sought thermal signature targets for the Idaho National Guard at Gowen Field, Boise, Idaho. The targets were required to realistically depict threat targets for

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direct fire gunnery programs of tank, anti-tank, helicopter and Bradley Fighting Vehicle weapons. The IFB provided specifically that full-scale targets must be capable of sustaining at least 50 frontal and 80 flank hits by nonexplosive TPT (shell) rounds up to 120mm diameter over 90 percent of target without degrading the thermal image.

The IFB provided that bid samples were to be furnished as part of the bid and that the samples would be tested to determine compliance with all the characteristics listed for examination in the solicitation. The IFB warned that failure of bid samples to conform to the required characteristics would require rejection of the bid. The IFB also provided that the requirement for furnishing bid samples might be waived for a bidder if: (1) the bid stated that the offered product is the same as a product previously offered by the bidder to the installation at Gowen Field, Boise, Idaho, and (2) the contracting officer determined that the previously offered product was accepted or tested and found to comply with specification and other requirements for technical acceptability conforming in every material respect with those in this solicitation.

In its report, the agency provides a synopsis of the performance history of the Blane thermal targets at Gowen Field. The report provided "[d]ata recorded on Blane Thermal targets during the period 1 February to 1 September 1989 [which] reflects the experienced round life per target average for the [following] types of thermal targetry":

T-72 Frontal	48.5rds 105mm
BMP Frontal	21.5rds 105mm
T-72 Flank	65.2rds 105mm

The protester argues that this information constitutes a documented failure of the Blane target and proves the target to be inadequate to meet the specification requirements of the subject solicitation. CTA asserts that it was inappropriate for the National Guard to waive the bid sample requirement pursuant to the clause described above where the performance history demonstrates that the target would not comply with the IFB's specifications. We agree.

The bid sample waiver provision required, first, that a bidder requesting waiver must state that the offered product is the same as a product previously offered by the bidder to the installation at Gowen Field. The agency concedes that Blane failed to provide such a statement. More importantly, however, the waiver provision required that the contracting officer determine that the previously offered product comply with specification and other

requirements for technical acceptability conforming in every material respect with those in this solicitation. The agency explains that the average target life per round results quoted above may have been affected by lack of gunner experience and familiarity with the types of weapons used. Nevertheless, the record simply does not show that Blane's previously offered product complies with the solicitation requirement that the thermal target be capable of sustaining at least 50 frontal and 80 flank hits since the average life expectancy of the Blane targets was considerably shorter.

We think that it is fundamental that an agency must treat bidders equally. Because of its impact on the competitive bidding system, a contracting agency may not waive an advertised specification if the deviation from it goes to the substance of a bid or works an injustice to other bidders. Niagara Machine & Tool Works, B-214288, July 16, 1984, 84-2 CPD ¶ 48. Here, we conclude that the agency, by improperly waiving the bid sample requirement for Blane, in effect, relaxed a specification for Blane whose product otherwise would have been nonresponsive. We find that this deviation goes to the substance of the bid and works an injustice to other bidders who were required to submit samples demonstrating compliance.

Moreover, the record shows that CTA submitted two bid samples, one of which was identified to the agency by CTA's president as the sample to be field tested (the 12 amp model). The agency, however, did not field test this sample because of difficulties with its generators. Thus, the record not only shows that the agency improperly failed to request and test a sample from Blane, but also failed to test the appropriate sample furnished by the protester.^{1/}

The protest is sustained. By separate letter to the Secretary of the Army, we are recommending that the contract with Blane be terminated and the requirements of IFB DAHA10-89-B-0006 be resolicited to require all bidders to provide

^{1/} In this regard, the Army, in its agency report cover letter, states that both samples furnished by the protester were tested and failed. However, our review of the basic documents, including statements of personnel present at the test site, clearly shows that only one CTA sample was tested (the 6 amp model).

a bid sample which will be tested in accordance with the specifications provided in the IFB. We also find that CTA is entitled to be reimbursed its protest costs.

for *Walter L. Foster*
Comptroller General
of the United States